1996

BARBARA MAYNARICH, Plaintiff, Appellant, vs. ALBERT BOVIER, Defendant, Appellee : Petition for Writ of Certiorari

Utah Court of Appeals

Barbara Maw; Attorney for Appellee.
Todd S. Richardson; Richardson, Packard & Lambert; Attorneys for Appellant.

IN THE UTAH SUPREME COURT

BARBARA MAYNARICH,	:	Prior No. 960246-CA
	:	930700193PI
Plaintiff/Appellant,	:	970023
vs.	:	
ALBERT BOVIER,	:	
Defendant/Appellee.	:	

PETITION FOR WRIT OF CERTIORARI

PLAINTIFF/APPELLANT

BARBARA MAYNARICH

Review of Utah Court of Appeals
Unpublished Memorandum Decision

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QUESTIONS PRESENTED FOR REVIEW

A. Did the Court of Appeals fail to follow the applicable standard of review following a trial court's granting a motion for a directed verdict.

B. Did the Court of Appeals improperly weigh evidence presented before the trial court to resolve a factual dispute **against** the party who the trial court directed the verdict against.

C. Did the Court of Appeals fail to properly address applicability of "offensive" use of the Utah Good Samaritan Act, Utah Code Annotated § 78-11-22, relating to potential comparative negligence of a "good Samaritan" in causing her own injuries.

REFERENCE TO THE OPINION OF THE COURT OF APPEALS

The Utah Court of Appeals issued a memorandum decision (not for official publication) affirming the trial court's granting a directed verdict. A subsequent amended memorandum decision was also filed by the Court of Appeals, though the substance of the memorandum decision did not change. The Court of Appeal's memorandum decisions constitute grounds for this petition for writ of certiorari for review of the decision by the Utah Supreme Court. Complete copies of these decisions, and all other procedural and substantive rulings by the Utah Court of Appeals are attached in the Appendix herewith.

JURISDICTION OF THE SUPREME COURT

A. Petitioner seeks certiorari review of the final amended memorandum decision of the Utah Court of Appeals dated and filed December 5, 1996.

B. Prior to the Court of Appeal's issuance of its

amended memorandum decision dated December 5, 1996, the Court of Appeals had previously issued a memorandum decision which was filed on November 21, 1996. A petition for rehearing, following the original memorandum decision of the Court of Appeals, was filed on behalf of Petitioners on December 5, 1996, the same day that the Utah Court of Appeals filed its amended memorandum decision. The Utah Court of Appeals entered an order denying the Petition for re-hearing on December 11, 1996.

C. Reliance on Rule 47(c), not applicable.

D. The Utah Supreme Court originally had jurisdiction of the appeal of a final judgment on a directed verdict by a district court pursuant to Utah Code Annotated 78-2-2(3)(j). Jurisdiction was then transferred to the Utah Court of Appeals pursuant to Utah Code Annotated § 78-2-2(4). After transfer of the matter to the Utah Court of Appeals, jurisdiction was vested there pursuant to Utah Code Annotated § 78-2a-3(2)(j). Jurisdiction now vests with the Supreme Court pursuant to Utah Code Annotated § 78-2-2(3)(a), in that Petitioner seeks appellate review of a judgment of the Utah Court of Appeals.

GOVERNING STATUTES, COURT RULES

Utah Rules of Civil Procedure 50(a).Motion for a directed verdict and for judgment notwithstanding the verdict.

(a) Motion for directed verdict; when made; effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do

and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific ground(s) therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

Utah Code Annotated § 78-11-22. Good Samaritan Act.

A person who renders emergency care at or near the scene of, or during an emergency, gratuitously and in good faith, is not liable for any civil damages or penalties as a result of any act or omission by the person rendering the emergency care, unless the person is grossly negligent or caused the emergency. As used in this section, "emergency" means an unexpected occurrence involving injury, threat of injury, or illness to a person or the public, including motor vehicle accidents, disasters, actual or threatened discharges, removal, or disposal of hazardous materials, and other accidents or events of a similar nature. "Emergency care" includes actual assistance or advice offered to avoid, mitigate, or attempt to mitigate the effects of an emergency.

STATEMENT OF THE CASE

In this matter the Utah Court of Appeals affirmed the district court's granting of a motion for directed verdict against plaintiff Maynarich.

Defendant/Appellee Albert Bovier (hereinafter landlord Bovier) owned residential property which he leased to Stephanie

Dunlap. The property was located in the foothills in Price, Carbon County, Utah. Trial transcript, Volume 1, pp. 4, 84, 135, 139 (R.800, 880, 931, 935).

On at least one occasion, in 1989, prior to the time that landlord Bovier leased the property to Dunlap, run-off rain water came onto the property, covered the northwest corner with mud and silt and flooded the basement of the home. In an effort to mitigate the effect of run-off water coming onto the property, landlord Bovier had a retaining wall constructed on the rear of the property, the construction being ongoing and under contract at the time the lease was entered into between landlord Bovier and Dunlap. Trial transcript, Volume 1, pp. 7, 54-60, 62-70, 84-85, 112-113, 118, 121-123, 132 and 140 (R. 803, 850-856, 858-866, 880-881, 908-909, 914, 917-919, 928 and 936).

In the following year, 1990, after a summer storm, run-off rain water accumulated behind the retaining wall, flowed around it and ran onto the leased property and again covered the northwest corner with mud and silt and flooded the basement of the home, which at that time was leased to Stephanie Dunlap. Defendant landlord Bovier undertook additional measures to correct and mitigate the problems of run-off water coming onto the property following this second flooding incident. Trial transcript, Volume 1, pp. 94-97, 123, 126, 134, 149-151 (R. 890-893, 919, 922, 930, 945-947).

During the next year, 1991, defendant landlord Bovier undertook additional measures attempting to assure that the run-off

water and mud, even though it would come onto the property, would not flood the basement of the home and would be directed to the curb and gutter systems of the city. In order for the water, mud and silt to reach the curb and gutter system, it had to travel the entire western boundary of the property, several feet away from the driveway. Another thunder storm came September 7th and once again run-off water not only flooded the basement of the leased home but also flooded the entire western boundary of the residential property with mud. Debris and silt also essentially covered the drive way on the property, which lies near the western boundary. Trial transcript, Volume 1, pp. 96-106, 113 and 127 (R. 892-902, 909 and 923).

When Stephanie Dunlap discovered that the basement was again flooded, she began to clean out the basement. While she was hauling water and mud from the basement she saw her neighbor, Plaintiff/Appellant Barbara Maynarich (hereinafter visitor Maynarich), and engaged in a discussion over the adjoining fences between their properties. Trial transcript, Volume 1, pp. 107-109, 151-152, 154-155 (R. 903-905, 947-948, 950-951).

Plaintiff visitor Maynarich was an employee of the maintenance department of the College of Eastern Utah and had access to large wet dry vacuums through her employment. Though the parties dispute whether visitor Maynarich volunteered to come over to the property to see if the wet dry vac would work or whether she was invited by Stephanie Dunlap to come on the property, plaintiff visitor Maynarich did go onto the property owned by landlord Bovier

which had been leased to Dunlap. Trial transcript, Volume 1, pp. 156-157, 172-173 and Volume 2 pp. 333-335 (R.952-953, 968-969, R. 1129-1131).

The trial testimony with regards to the status of Maynarich as being a "business visitor" or a "licensee" included the direct testimony of Maynarich as follows:

> Q. Did you have a conversation with Stephanie as you were outside?
> A. I did.
> Q. And would you describe in your words the conversation.
> A. Right about then she came over to the fence and her and I were talking. She was just telling me about her basement.
> I have access to equipment at the college because I work in the maintenance department. I have access to equipment and so I just told her that they had a wet and dry vac that might be helpful to her to use.
>
> * * *
>
> Q. And do you believe that Stephanie wanted you to see how bad it was?
> A. Yes.
> Q. Did you feel that you had any obligation to provide help to Stephanie?
> A. I mean, as far as being obligated, no, but I helped her because I knew her. She was a friend of mine. She had little children at the time, and before I got married four years ago I was divorced when I married. I know how hard it is to be a single parent, and I was trying to do what I could do to help her out.
> Q. How long did that conversation last over the fence?
> A. I'd say maybe five minutes.
> Q. And did you then go over to Stephanie's house?
> A. Yes.

TRIAL TRANSCRIPT, Volume II, pp. 333, lines 13-25, 334 and 335 lines 1-19. (R. 1129-1131).

Tenant Dunlap's trial testimony was essentially the same and proceeded as follows:

Q. When did you first see my client Barbara Maynarich on that day?

A. As far as what time?

Q. Yes.

A. Approximately 6:30, 7 o'clock.

Q. And how did you come to see her?

A. Over the fence. She lives over here, and I was bringing the buckets out and we just kind of come together and was talking for a few minutes. She was in her front yard. I was coming out the basement door.

Q. Okay. So she lived in the home next door?

A. Yes.

Q. What was discussed in the conversation, if you recall?

A. How messy the situation was and how much the rainstorm, how much rain came down. She offered -- she asked me how much mud and water was in the basement. I said it was completely flooded all the way across.

She says, "Well, I have access --" "I possibly have access to a wet/dry vac." She says, "Maybe you could use that, you know, if it would help clean up the carpet."

* * *

Q. I understand. You can go ahead and sit down. So did she come to your house?

A. Yes.

Q. Why did she come?

A. For two reasons. To see if there was -- I didn't know if there was too much mud, because she asked if there was too much mud and I didn't know how much. She came over to see how much, because I didn't know anything about a wet-dry vac, and to see the flooded basement.

Q. Did you invite her to come over?

A. As the natural, "Barbara, would you come over to my house?" or -- it was a mutual thing. She wanted to come and I wanted her to come. So if that's an invitation, then yeah, I guess.

Q. And you, of course, were appreciative of the fact that she was going to try to help out with the wet/dry vac?

A. Yes.

Q. Now, how much time went by from when you had the conversation over the fence until you actually saw her?

A. Not a whole lot. I'd say less than ten minutes.

Q. And how did you come to see her? Let me rephrase the question. When did you first see Barbara?

A. I think she was either coming down the stairs to the basement or she was coming through the basement door. I don't remember which.

Q. And again, the basement door, that's the walk-out door from the basement, correct?

A. Right.

Q. And again, just to give the jurors a flavor for where that is, that's behind the garage and it's west of the actual house, correct?

A. Correct.

TRIAL TRANSCRIPT, Volume I, pp. 154, lines 18-25, 155, 156, 157 lines 1-23. (R. 950-953). If it were a given that there was a dispute in the trial testimony as to the status of Maynarich as being a "business visitor" or a "licensee", it is certainly clear that there was at least some evidence upon which a reasonably minded jury could conclude that Maynarich was a "business visitor". That factual issue, i.e. whether Maynarich was a "business visitor" or "licensee" should have been resolved in favor of the non-moving party for purposes of the appeal of the directed verdict.

Plaintiff visitor Maynarich went into the basement of the home and observed the flooding and concluded, along with others present, that there was too much mud and silt for a wet dry vacuum to work. She subsequently tended one of the young children of Stephanie Dunlap while Stephanie Dunlap and a friend continued cleaning the flood waters, mud, and silt from the basement. Trial transcript, Volume 1, pp. 157, 159-160, 171; Volume 2 pp. 335, 358-362 (R. 953, 955-956, 967, R. 1131, 1154-1158).

After a short time, plaintiff visitor Maynarich proceeded upstairs from the basement, outside and then walked close to the western boundary of the property (the same area which had been severely flooded, and covered with mud and silt) to return to her

home next door. As she stepped from the mud covered grass to the mud covered driveway she slipped and fell causing a bimalleolar fracture to her right ankle. Special damages from the injury amounted to at least $27,211.63 of past and future medical expenses and a wage loss of at least $1,600.00. Trial transcript, Volume 1, pp. 161-163; Volume 2 pp. 295, 337-338, 352, and 355 (R. 957-959; R. 1091, 1133-1134, 1148 and 1151).

Immediately following plaintiff resting her case, without recess, Seventh District Court Judge Halliday heard and granted the defendant's motion for a directed verdict. Trial transcript, Volume 2, pp. 392-393 (R. 1188-1189).

Plaintiff Maynarich contended before the Utah Court of Appeals, and put on evidence before the trial court, that she was a "business visitor" for purposes of analyzing premise liability. Defendant Bovier claimed Maynarich was a "licensee" and claims to have put on evidence to support such a factual conclusion by the jury.

Plaintiff Maynarich appealed the directed verdict of the trial court with the appeal eventually being briefed to and decided by, the Utah Court of Appeals.

Plaintiff Maynarich properly identified the standard of review for the Court of Appeals of the trial court's granting the motion for a directed verdict. Appellant's Brief P. 7 et.seq. However, rather than following that standard of review, and without even mentioning the standard of review, the Court of Appeals issued a unanimous decision by memorandum decision not for official

publication. When analyzed, the very requirements of the standard of review of the trial court's granting a motion for directed verdict, that being that the Court of Appeals consider the evidence in the light most favorable to the party against whom the directed verdict was granted, the Court of Appeals went on to make factual findings about disputed facts at trial and based the balance of its' memorandum decision on those factual conclusions reached.

The second paragraph of the amended memorandum decision concludes that issues concerning the existence of a duty, in a negligence action, are questions of law to be determined by the court. The third paragraph of the amended memorandum decision states generally accepted Utah law that a property owner's duty to a person injured on the property is determined by the status of the person on the property. Thereafter, the Utah Court of Appeals cited three cases including *Pratt v. Mitchell Hollow Irr. Co.*, 813 P.2d 1169 (Utah, 1991), *Whipple v. American Fork Irr. Co.*, 910 P.2d 1218 (Utah, 1996) and *English v. Kienke*, 848 P.2d 153 (Utah, 1993) as support for general legal conclusion of the third paragraph.

Next, the Utah Court of Appeals specifically recognizes at the end of paragraph three that there was a factual dispute between the parties as to conclusions they would draw as to the status of Maynarich on Bovier's property.

> As such, this case is determined by Maynarich's status on the land. Maynarich contends she is a business invitee; however, Bovier contends Maynarich is a licensee."

Presumably, the Utah Court of Appeals assumed that given that the existence of a duty is a question of law the Court of Appeals could

review the evidence before the trial court and reach its own conclusion as to Maynarich's status on Bovier's property. The fifth paragraph of the amended memorandum decision indicates:

> We conclude Maynarich's actions do not reach the level of a business visitor. Maynarich did not have business dealings with Bovier or Dunlap, although Maynarich's offer to acquire a wet/dry vacuum to assist Dunlap's clean-up efforts may have had some advantage to Bovier, this offer is much more akin to a volunteer to help than to a business advantage for Bovier.

In making this factual determination, the Utah Court of Appeals completely overlooked the standard of review for the directed verdict by the trial court. The Utah Court of Appeals was to have considered the evidence in the light most favorable to Maynarich and resolved controverted facts in her favor based on the numerous Utah cases which have construed and interpreted the Appellate standard of review for Utah Rules of Civil Procedure 50(a) governing directed verdicts.

The Utah Court of Appeals concluded that Maynarich's entry onto the property was in the status of a social guest and accordingly a "licensee" and as support thereof cited to the Restatement Second of Torts Section 332, comment b. The Utah Court of Appeals selected a portion of comment b which included the following:

> . . . a volunteer helper who comes upon land to aid in getting a truck out of a mud hole, or in putting out a fire, **without being asked to do so**, is a licensee but not an invitee.

Amended Memorandum Decision paragraph 4 (emphasis added). However, based on the trial testimony, which was amply referenced to the

Court of Appeals, plaintiff Maynarich was not a volunteer without having been asked to do so. Defendant Dunlap testified before the trial court clearly that plaintiff Maynarich was invited onto the premises with the hopes of being able to help with the mud filled basement.

Once the Court of Appeals made the factual determination that plaintiff Maynarich constituted a "licensee", the Court of Appeals went on to conclude that under the facts of the case there would be no duty from land owner Bovier to visitor Maynarich and that in any event, mud upon which plaintiff Maynarich slipped and fell was an open and obvious danger.

The Court of Appeals ignored the "Good Samaritan" arguments advanced on behalf of Visitor Maynarich claiming the arguments to be without merit. See footnote 3 Amended Memorandum Decision, last sentence.

ARGUMENT

A. DID THE COURT OF APPEALS FAIL TO FOLLOW THE APPLICABLE STANDARD OF REVIEW FOLLOWING THE TRIAL GRANTING A MOTION FOR A DIRECTED VERDICT?

The standard of review for the Court of Appeals' consideration of the directed verdict by Judge Halladay was expressly stated to the Court of Appeals in the Appellant's Brief at page 7. As cited to the Utah Court of Appeals, this Court in *Cruz v. Montoya*, 660 P.2d 723, 728-729 (Utah, 1983), with citations omitted, indicated:

> In directing a verdict the trial court may not weigh the evidence. (Citations omitted). Rather the court must consider the evidence in

> the light most favorable to the party against whom the motion is directed and resolve controverted facts in his favor. (Citations omitted). If the evidence and its inferences would cause a reasonable man to arrive at different conclusions as to whether the essential facts were not proven then the question is one for fact for the jury.

In that the Court of Appeals failed to apply this standard of review in reaching its Memorandum Decision, then clearly, the requirement of the Utah Rules of Appellate Procedure, Rule 46(a)(3) governing considerations for granting a writ of certiorari is satisfied here. The Memorandum Decision has departed so far from accepted and usual course of judicial proceedings given the failure of the Court of Appeals to follow the standard of review that this Court should exercise its power of supervision and review the matter accordingly.

The Utah Court of Appeals departed from the standard of review when it began to analyze and weigh evidence supporting, or contradicting Plaintiff Maynarich's assertion that there was evidence to support a conclusion that she may have been a "business visitor" for purposes of applying premise liability law. Given the disputed nature of the facts supporting a potential jury conclusion of a "business visitor" as compared to a "licensee" it is apparent that the Court of Appeals' decision should have analyzed "business visitor" status.

Initially, the Court of Appeals relied upon Utah cases, with respect to the question of category of the visitor, in which the category of the visitor to the property was not questioned. Two of the cases involved trespassers, admitted to by parties to

the appeals, and the third case involved a business visitor, again agreed to between the parties. These cases do not support the Court's conclusion that it could decide the question of the status of visitor Maynarich on defendant Bovier's property at the Appellate Court level. To the contrary, as was argued to the Court of Appeals in the Petition for Rehearing, it is black letter law that the status of a person entering property is a question that is reserved for the jury. This Court in *Rogalski v. Phillips Petroleum Co.*, 282 P.2d 304 (Utah, 1955) concluded that with respect to status of a visitor to property the type of the invitation and consequently the status of the visitor to the property ". . . has been held to be a question of fact for the jury to decide, citations omitted. In other words, it is for the jury to determine whether a person in plaintiff's position would believe under the circumstances that the occupier of the property desired to enter into that portion of the property." *Rogalski* at 306. More recently this Court again emphasized that the categorization of a visitor to property is a question that is to be reserved for the jury in *Gourdin By and Through Close v. SECRA*, 845 P.2d 242 (Utah, 1992) this Court specifically concluded that a jury question is presented.

> Of course, the jury is not restricted to those two alternatives. SECRA contends that if Gourdin was not an employee, then he must have been a trespasser, to whom it owed no duty. Consequently, it argues any error resulting from the directed verdict was harmless. However, **categorizing Gourdin as a trespasser is only one of the several possible conclusions the jury might have reached.** Because those conclusions would have reached

> divergent outcomes, the directed verdict could not possibly have constituted a harmless error.(emphasis added)

Numerous other jurisdictions, which continue to recognize the common law categories for visitors to property, have reached the same conclusion that this Court has reached. Years ago, the California Court of Appeals specifically addressed the very question in *Speece v. Browne*, 40 Cal.Rpt. 384, 40 Cal.Rpt. 384, 387 (Cal. App., 1964).

> Whether one is a licensee or an invitee is ordinarily a question of fact. (Citations omitted). Accordingly, the issue before us is whether there is evidence from which the jury could have found plaintiff to be an invitee.

Speece at 386. The *Speece* case has been followed many times by other California courts. A more recent Idaho Supreme Court case reached the same conclusion. See *Holzheimer v. Johannesen*, 371 P.2d 814 (Idaho, 1994).

With it being relatively clear that the question of the status of the person on the property is a question reserved for the jury, the Court of Appeals' decision in this matter requires review because (1) the Court of Appeals substituted its judgment for a factual finding to have been made by the jury in this matter, but more importantly (2) the Court of Appeals failed to apply the standard of review and resolve controverted fact in favor of Visitor Maynarich. In order to conduct a proper analysis the Court of Appeals would have had to have concluded Visitor Maynarich was a "business visitor".

B. DID THE COURT OF APPEALS IMPROPERLY WEIGH EVIDENCE PRESENTED BEFORE THE

TRIAL COURT TO RESOLVE A FACTUAL DISPUTE AGAINST THE PARTY WHO THE TRIAL COURT DIRECTED THE VERDICT AGAINST?

Just as with question A, presented above, if the Court of Appeals weighed evidence to reach a factual determination which should have been made by the jury as to the status of visitor Maynarich to Bovier's property then the decision of the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings that the Supreme Court's power of supervision is again invoked pursuant to the Utah Rules of Appellate Procedure Rule 46(a)(3). The amended Memorandum Decision of the Court of Appeals specifically references Section 322 of the Restatement Second of Torts, comment b. Reference to this Restatement Second of Torts section is contained in paragraph 4 of the Amended Memorandum Decision. The quotation used from comment b was taken from the second paragraph, which in its entirety provides as follows:

> Mere permission, as distinguished from invitation, is sufficient to make the visitor a licensee as stated in § 330; but it does not make him an invitee, even where his purpose in entering concerns the business of the possessor. Thus a volunteer helper who comes upon land to aid in getting a truck out of a mud hole or putting out a fire, without being asked to do so, is a licensee but not an invitee. Likewise a canvasing salesman calling at a private home in the hope of selling magazines is not an invitee, until he is invited into the house to discuss the matter, or the possessor otherwise encourages his interest for that purpose.

The Court of Appeals' reference to the second paragraph from the Restatement comment is clearly taken out of context. The

Restatement comment was distinguishing between permission and invitation for purposes of determining business visitor status. The example used by the Court of Appeals in its decision in comparing the actions of visitor Maynarich coming onto the property to inspect to determine if a wet/dry vacuum available to her would be effective in cleaning up the muddy mess, at the express invitation of tenant Dunlap clearly does not fall within the portion of comment b of Restatement Second of Tort section 332. Because visitor Maynarich was specifically invited to come onto the property, the reference to a volunteer helper to come onto property without being invited to do so is entirely misplaced.

The only way for the Court of Appeals to have accurately relied on the portion of Restatement Second of Torts Section 332 comment b could have been for the Court of Appeals to weigh the evidence before the trial court and reach a conclusion that Visitor Maynarich was not invited onto the property, rather she came of her own accord. Such weighing of the evidence was clearly improper based on the standard of review. Proper application of the standard of review would have required the opposite conclusion by the Court of Appeals, that is the disputed facts be resolved in favor of the party against whom the directed verdict was entered, that being Visitor Maynarich. To conduct an adequate analysis, the Court of Appeals must have concluded that Visitor Maynarich was a "business visitor" rather than a "licensee".

The eventual outcome of the decision would certainly have been effected had the Court of Appeals analyzed "duty" assuming

Visitor Maynarich was a "business visitor". Based on law which has existed in Utah since 1955 decided by this Court in the case of *Rogalski v. Phillips Petroleum Co.*, 282 P.2d 304 (Utah, 1955),

> The duty owed by an owner of land to a business visitor is to inspect and maintain his premises in a reasonably safe condition or to warn the visitor of any dangerous condition existing thereon. Restatement of Torts § 343.

Rogalski at 307. The final paragraph of the decision by the Utah Court of Appeals clearly did not apply the duty owed to "business visitors" under Utah law. To the contrary, the Utah Court of Appeals apparently resorted to an "open and obvious danger" analysis to bolster its conclusion that there was no duty potentially owed from defendant Bovier to visitor Maynarich. The Court of Appeals Decision suggested:

> In this case, Bovier did not have a duty to warn Maynarich of the mud covering the driveway or to make the condition safe before she entered the property. Maynarich testified that she was aware of the mud on the driveway before she entered Bovier's property. Thus, although Bovier's modifications may have contributed to a buildup of mud on the driveway, the mud on the driveway was not a latent condition. Rather, the neighborhood as a whole was covered with debris and mud after the rain fall, and the mud on the driveway was readily apparent.

The Utah Court of Appeals' comments in its decision are ironic considering that it was the Utah Court of Appeals that decided *Donahue v. Durfee*, 780 P.2d 1275 (Utah App. 1989), cert. denied, 789 P.2d 33, (Utah, 1990). In *Donahue* the Utah Court of Appeals specifically abrogated the common law defense of "open and obvious dangers" in comparative fault cases. Is the Utah Court of Appeals

now overturning its decision in *Donahue* and applying an "open and obvious danger" analysis to support its decision in this case? The only other interpretation that can be placed on the Utah Court of Appeals' decision, last paragraph, is that it was ruling as a matter of law that Visitor Maynarich's comparative fault must have exceeded that of defendant Bovier. Such a conclusion by the Utah Court of Appeals would once again be invading the factual determinations reserved for the trier of fact, in this matter the jury which was empaneled prior to the trial court granting its motion for a directed verdict.

C. DID THE COURT OF APPEALS FAIL TO PROPERLY ADDRESS THE APPLICABILITY OF "OFFENSIVE" USE OF THE UTAH GOOD SAMARITAN ACT, UTAH CODE ANNOTATED § 78-11-22 RELATING TO POTENTIAL COMPARATIVE NEGLIGENCE OF A "GOOD SAMARITAN" IN CAUSING HER OWN INJURIES.

The Utah Court of Appeals in its Amended Memorandum Decision essentially ignored Visitor Maynarich's arguments surrounding "offensive" use of the Utah Good Samaritan Act. See Amended Memorandum Decision footnote 3, last sentence. Petitioners are not aware of any decision by this Court as to the applicability or use of the Utah Good Samaritan Act contained at Utah Code Annotated § 78-11-22. Accordingly, pursuant to Rule 46 of the Utah Rules of Appellate Procedure (a)(4), based on its refusal to address this issue in this case the Utah Court of Appeals decided an important question of State law which is not been, but should be settled by the Supreme Court.

The facts before the trial court in this matter, based on the argument of Visitor Maynarich, should have resulted in the trial court instructing the jury as to applicability of the Utah Good Samaritan Act. Presentation of such a jury instruction would have been based upon the potential for the jury concluding that Visitor Maynarich was acting as a "Good Samaritan" under the terms and conditions of the statute. Had the jury reached such a conclusion, based on the plain language of the statute, then Visitor Maynarich's comparative fault would have only been applicable if the comparative fault amount to "gross negligence". Because Visitor Maynarich believes she was a Good Samaritan or volunteer and that the protections of the statute apply to her, essentially the burden of proof would have shifted to defendant Bovier to show that Visitor Maynarich's comparative fault reached the level of gross negligence as is required under the statutes.

This matter presents the opportunity for the Utah Supreme Court to address squarely the issue of whether "offensive" use of the Utah Good Samaritan Act is viable in Utah. Indeed, by granting this Writ of Certiorari the Court would have the opportunity to set some parameters and guidelines for use of the Utah Good Samaritan Act, as there have not, according to petitioner's knowledge, been a Utah Supreme Court decision covering applicability of Utah Code Annotated § 78-11-22.

CONCLUSION

For all the above reasons, Petitioners request that the Supreme Court grant certiorari for review of the Utah Court of Appeals decision in this matter.

RESPECTFULLY SUBMITTED this 10th day of January, 1997.

RICHARDSON, PACKARD & LAMBERT

Todd S. Richardson, P.C.
Attorney for
Plaintiff/Appellant
Barbara Maynarich

CERTIFICATE OF MAILING

I hereby certify that two (2) true and correct copies of the foregoing Plaintiff/Appellant's Petition for Writ of Certiorari, were mailed, first class, postage prepaid, on this the 10th day of January, 1997, to:

Barbara Maw
Attorneys for Defendant/Appellee Bovier
185 So. State Street, Suite 340
Salt Lake City, Utah 84111

I further certify that on this day that an original and nine (9) copies of this Petition for Writ of Certiorari were delivered to the clerk of the Supreme Court of Utah Court.

APPENDIX

MEMORANDUM DECISION
(NOT FOR OFFICIAL PUBLICATION)

IN THE UTAH COURT OF APPEALS

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Barbara Maynarich, Plaintiff and Appellant, v. Albert Bovier and Stephanie Dunlap, Defendants and Appellee.	MEMORANDUM DECISION (Not For Official Publication) Case No. 960246-CA F I L E D (November 21, 1996)

Seventh District, Price Department
The Honorable Bruce K. Halliday

Attorneys: Todd S. Richardson, Salt Lake City, for Appellant
Barbara L. Maw, Salt Lake City, for Appellee

Before Judges Bench, Billings, and Jackson.

BILLINGS, Judge:

Appellant Barbara Maynarich appeals a directed verdict entered in favor of Albert Bovier determining that Bovier, the owner/landlord of residential property on which Maynarich was injured, was not liable for her injury. We affirm.[1]

In a negligence case, "a plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." Hunsaker v. State, 870 P.2d 893, 897 (Utah 1993). However, "resolution of the issue of duty is dispositive of . . . negligence claims," and "whether a duty exists is a question of law to be determined by the court." Id.

Utah courts have often recognized "a property owner's duty to a person injured on his [or her] property is determined by that person's status on that property, an 'invitee,' or a

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1. Our ruling today also disposes of appellant's motion for summary reversal.

'licensee,' or a 'trespasser.'" Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169, 1172 (Utah 1991); accord Whipple v. American Fork Irr. Co., 910 P.2d 1218 (Utah 1996); see also English v. Kienke, 848 P.2d 153, 155 n.1 (Utah 1993). As such, this case is determined by Maynarich's status on the land. Maynarich contends she is a business invitee; however, Bovier contends Maynarich is a licensee.

The Restatement Second of Torts defines a business invitee as "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land," Restatement (Second) of Torts § 332 (1964), and a licensee as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent," id. § 330. The Restatement notes "a social guest may be cordially invited, and strongly urged to come, but he [or she] is not an invitee." Id. § 332 cmt. a. Further, the Restatement recognizes, for example, "a volunteer helper who comes upon land to aid in getting a truck out of a mudhole, or in putting out a fire, without being asked to do so, is a licensee, but not an invitee." Id. § 332 cmt. b.

We conclude Maynarich's actions do not reach the level of a business visitor. Maynarich did not have business dealings with Bovier or Dunlap. Although Maynarich's offer to acquire a wet-dry vacuum to assist Dunlap's cleanup efforts may have had some advantage to Bovier, this offer is much more akin to a volunteer to help than to a business advantage for Bovier.

Utah courts have defined an owner's duty to licensees.

> Although [the owner] has a duty to exercise reasonable care to avoid injury to such licensees, he generally has no duty to inspect his land to discover possible dangers, or to correct natural conditions on his land to guard against dangers to such licensees; and this is particularly true where the facts concerning any possible danger are just as apparent to the third party as to the landowner.

Stevens ex rel. Stevens v. Salt Lake County, 478 P.2d 496, 498-99 (Utah 1970).

In this case, Bovier did not have a duty to warn Maynarich of the mud covering the driveway or make the condition safe before she entered the property. Maynarich testified that she was aware of the mud on the driveway before she entered Bovier's property. Thus, although Bovier's modifications may have

contributed to a buildup of mud on the driveway, the mud on the driveway was not a latent condition. Rather, the neighborhood as a whole was covered with debris and mud after the rainfall, and the mud on the driveway was readily apparent. Moreover, under Stevens, Bovier did not have a duty to correct natural conditions on his land which would pose a danger, especially when that danger is apparent. We conclude the trial court properly determined that Bovier did not owe a duty to Bovier and therefore is not liable for her injury.[2] We therefore affirm.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

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3. Maynarich also contends the trial court improperly awarded Bovier deposition costs under Rule 54 of the Utah Rules of Civil Procedure. We will not disturb the trial court's determination of costs "unless it is so unreasonable as to manifest a clear abuse of discretion." Lloyd's Unltd. v. Nature's Way, 753 P.2d 507, 512 (Utah App. 1988). Because no such abuse occurred in this case, we conclude Maynarich's argument is without merit. We also find the remaining issues raised in Maynarich's brief to be without merit and therefore decline to address them. See State v. Carter, 776 P.2d 886, 888-89 (Utah 1989).

AMENDED MEMORANDUM DECISION
(NOT FOR OFFICIAL PUBLICATION)

IN THE UTAH COURT OF APPEALS

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Barbara Maynarich, Plaintiff and Appellant, v. Albert Bovier and Stephanie Dunlap, Defendants and Appellee.	AMENDED MEMORANDUM DECISION[1] (Not For Official Publication) Case No. 960246-CA F I L E D (December 5, 1996)

Seventh District, Price Department
The Honorable Bruce K. Halliday

Attorneys: Todd S. Richardson, Salt Lake City, for Appellant
Barbara L. Maw, Salt Lake City, for Appellee

Before Judges Bench, Billings, and Jackson.

BILLINGS, Judge:

Appellant Barbara Maynarich appeals a directed verdict entered in favor of Albert Bovier determining that Bovier, the owner/landlord of residential property on which Maynarich was injured, was not liable for her injury. We affirm.[2]

In a negligence case, "a plaintiff must establish four essential elements: (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, (3) that the breach of duty was the proximate cause of the plaintiff's injury, and (4) that the plaintiff in fact suffered injuries or damages." Hunsaker v. State, 870 P.2d 893, 897 (Utah 1993). However, "resolution of the issue of duty is dispositive of . . . negligence claims," and "whether a duty exists is a question of law to be determined by the court." Id.

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1. This Amended Memorandum Decision replaces the Memorandum Decision in Case No. 960246-CA issued on November 21, 1996.

2. Our ruling today also disposes of appellant's motion for summary reversal.

Utah courts have often recognized "a property owner's duty to a person injured on his [or her] property is determined by that person's status on that property, an 'invitee,' or a 'licensee,' or a 'trespasser.'" Pratt v. Mitchell Hollow Irr. Co., 813 P.2d 1169, 1172 (Utah 1991); accord Whipple v. American Fork Irr. Co., 910 P.2d 1218 (Utah 1996); see also English v. Kienke, 848 P.2d 153, 155 n.1 (Utah 1993). As such, this case is determined by Maynarich's status on the land. Maynarich contends she is a business invitee; however, Bovier contends Maynarich is a licensee.

The Restatement Second of Torts defines a business invitee as "a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealings with the possessor of land," Restatement (Second) of Torts § 332 (1964), and a licensee as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent," id. § 330. The Restatement notes "a social guest may be cordially invited, and strongly urged to come, but he [or she] is not an invitee." Id. § 332 cmt. a. Further, the Restatement recognizes, for example, "a volunteer helper who comes upon land to aid in getting a truck out of a mudhole, or in putting out a fire, without being asked to do so, is a licensee, but not an invitee." Id. § 332 cmt. b.

We conclude Maynarich's actions do not reach the level of a business visitor. Maynarich did not have business dealings with Bovier or Dunlap. Although Maynarich's offer to acquire a wet-dry vacuum to assist Dunlap's cleanup efforts may have had some advantage to Bovier, this offer is much more akin to a volunteer to help than to a business advantage for Bovier.

Utah courts have defined an owner's duty to licensees.

> Although [the owner] has a duty to exercise reasonable care to avoid injury to such licensees, he generally has no duty to inspect his land to discover possible dangers, or to correct natural conditions on his land to guard against dangers to such licensees; and this is particularly true where the facts concerning any possible danger are just as apparent to the third party as to the landowner.

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In this case, Bovier did not have a duty to warn Maynarich of the mud covering the driveway or make the condition safe

before she entered the property. Maynarich testified that she was aware of the mud on the driveway before she entered Bovier's property. Thus, although Bovier's modifications may have contributed to a buildup of mud on the driveway, the mud on the driveway was not a latent condition. Rather, the neighborhood as a whole was covered with debris and mud after the rainfall, and the mud on the driveway was readily apparent. Moreover, under Stevens, Bovier did not have a duty to correct natural conditions on his land which would pose a danger, especially when that danger is apparent. We conclude the trial court properly determined that Bovier did not owe a duty to Maynarich and therefore is not liable for her injury.[3] We therefore affirm.

Judith M. Billings, Judge

WE CONCUR:

Russell W. Bench, Judge

Norman H. Jackson, Judge

---

3. Maynarich also contends the trial court improperly awarded Bovier deposition costs under Rule 54 of the Utah Rules of Civil Procedure. We will not disturb the trial court's determination of costs "unless it is so unreasonable as to manifest a clear abuse of discretion." Lloyd's Unltd. v. Nature's Way, 753 P.2d 507, 512 (Utah App. 1988). Because no such abuse occurred in this case, we conclude Maynarich's argument is without merit. We also find the remaining issues raised in Maynarich's brief to be without merit and therefore decline to address them. See State v. Carter, 776 P.2d 886, 888-89 (Utah 1989).

CASE TITLE:

Barbara Maynarich,
Plaintiff and Appellant,
v.
Albert Bovier and
Stephanie Dunlap,
Defendants and Appellee.

Case No. 960246-CA

December 5, 1996. AMENDED MEMORANDUM DECISION (Not For Official Publication).

Amended Memorandum Decision of the Court by JUDITH M. BILLINGS, Judge; RUSSELL W. BENCH and NORMAN H. JACKSON, Judges, concur.

CERTIFICATE OF MAILING

I hereby certify that on the 5th day of December, 1996, a true and correct copy of the attached AMENDED MEMORANDUM DECISION was deposited in the United States mail to the parties listed below:

Todd S. Richardson
Richardson, Packard, & Lambert
510 S. 600 E., #100
P.O. Box 112003
Salt Lake City, UT 84147-2003

Barbara L. Maw, Esq.
185 S. State St., #340
Salt Lake City, UT 84111

and a true and correct copy of the attached AMENDED MEMORANDUM DECISION was deposited in the United States mail to the judge listed below:

Honorable Bruce K. Halliday
Seventh District Court
149 E. 100 S.
Price, UT 84501

Judicial Secretary

TRIAL COURT:
Seventh District, Price Dept., #930700193PI

ORDER

IN THE UTAH COURT OF APPEALS

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Barbara Maynarich,

Plaintiff and Appellant,

v.

Albert Bovier & Stephanie Dunlap,

Defendants and Appellee.

ORDER

Case No. 960246-CA

This matter is before the court upon appellant's petition for rehearing, filed December 5, 1996.

IT IS HEREBY ORDERED that the petition for rehearing is denied.

Dated this 11th day of December, 1996.

FOR THE COURT:

Norman H. Jackson, Judge

CERTIFICATE OF MAILING

I hereby certify that on December 11, 1996, a true and correct copy of the foregoing ORDER was deposited in the United States mail to the parties listed below:

Todd S. Richardson
Richardson, Packard, & Lambert
510 S. 600 E., #100
P.O. Box 112003
Salt Lake City, UT 84147-2003

Barbara L. Maw, Esq.
185 S. State St., #340
Salt Lake City, UT 84111

and a true and correct copy of the foregoing ORDER was deposited in the United States mail to the trial court listed below:

Seventh District Court
149 E. 100 S.
Price, UT 84501

Dated this December 11, 1996.

By _____
Robin Hutcheson
Deputy Clerk

Case No. 960246-CA
Seventh District, Price Dept., #930700193PI